82-1250

NO.

in the
Supreme Court
of the
United States

OCTOBER TERM 1982

THE STATE OF FLORIDA, on the Relation of GLEN E. SMITH, as trustee,

Petitioner,

vs.

ORANGE COUNTY, a political subdivision of the State of Florida; ALLEN E. ARTHUR; LEE CHIRA; DICK FISCHER; JACK MARTIN; and LAMAR THOMAS, as members and constituting the Board of County Commissioners of Orange County, Florida; FORD S. HAUSMAN, Property Appraiser, Orange County, Florida; EARL K. WOOD, as Tax Collector, Orange County, Florida.

Respondents.

and

Ann Ross, Intervenor and class representative,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA; AND THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIFTH DISTRICT

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QUESTIONS PRESENTED

1. Does the Supreme Court of Florida, notwithstanding the District Court's failure to make an express decision, have jurisdiction under (A) supervisory power necessary to protect the provisions of United States Constitution, and the Constitution of State of Florida; (B) implied and inherent power and jurisdiction to correct judicial fundamental error of such constitutional dimension in that enforcement would constitute the impairment or taking of property without due process of law in violation of the U.S. Constitution, 5th and 14th Amendments; (C) implied or inherent jurisdiction and power to correct fundamental error as would constitute the violation or destruction of rights guarantee by Declaration of Rights under the Constitution of Florida, 1968 Revision; (D) discretionary jurisdiction of the Supreme Court to review a district court of appeal which violates a provision of the Constitution of Florida, Article 8 Sec. 2 (a) that when any municipality is abolished a provision shall be made for the protection of its creditors; (E) the "all Writ" necessary and proper to the complete exercise of the Supreme Court jurisdiction.

2. Can a District Court of Appeal go beyond the confines of record on appeal, comb and search the record of a final judgment already heard on appeal by another district court of appeal, and then determine that final judgment against a town does not bind the town inhabitants because "No defaults were entered against the town where such findings are false?" Can the Court after knowledge that its findings are not true, perpetuate said fundamentals by refusing to correct its error?

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Glen E. Smith, as trustee, prays that a Writ of Certiorari issue to review the judgments of (1) The Supreme Court of Florida entered on October 29, 1982 in Glen E. Smith, etc, Petitioner vs Orange County, etc., et al., Case No. 62,806; (2) The District Court of Appeal of the State of Florida, Fifth District entered on September 29, 1982 in Case No. 82-94, The State of Florida on the relation of Glen E. Smith, as Trustee, Appellate v. Orange County, etc., Allen E. Arthur; Lee Chira; Dick Fischer; Jack Martin; Lamar Thomas, etc., Ford S. Hausman, etc., Earl K. Wood, etc., and Ann Ross, etc.

OPINIONS BELOW

The Supreme Court of Florida has issued an opinion in this case, a copy of which appears in Appendix A to this Petition at page App. 1, which is not reported yet.

The District Court of Appeal, Fifth District, State of Florida, has issued its opinion and appears in Appendix B to this Petition, at page App. 3, and is reported on table So.2d 83.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on October 29, 1982. The jurisdiction of this Court invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

1. Does the Supreme Court of Florida, notwithstanding the District Court's failure to make an express decision, have jurisdiction under (A) supervisory power necessary to protect the provisions of United States Constitution, and the Constitution of State of Florida; (B) implied and inherent power and jurisdiction to correct judicial fundamental error of such constitutional dimension in that enforcement would constitute the impairment or taking of property without due process of law in violation of the U.S. Constitution, 5th and 14th Amendments; (C) implied or inherent jurisdiction and power to correct fundamental error as would constitute the violation or destruction of rights guarantee by Declaration of Rights under the Constitution of Florida, 1968 Revision; (D) discretionary jurisdiction of the Supreme Court to review a district court of appeal which violates a provision of the Constitution of Florida, Article 8 Sec. 2 (a) that when any municipality is abolished a provision shall be made for the protection of its creditors; (E) the "all Writ" necessary and proper to the complete exercise of the Supreme Court jurisdiction.

2. Can a District Court of Appeal go beyond the confines of record on appeal, comb and search the record of a final judgment already heard on appeal by another district court of appeal, and then determine that final judgment against a town does not bind the town inhabitants because "No defaults were entered against the town where such findings are false?" Can the Court after knowledge that its findings are not true, perpetuate said fundamentals by refusing to correct its error?

CONSTITUTIONS INVOLVED

This case involves Article 1 Sec. 21; Article 5, Sec. 3 (3) (7) and Article 8 Sec. 2 of Constitution of the State of Florida.

This case also involves Article 1 Sec. 10; Fifth Amendment and Section 1 of the Fourteenth to the Constitution of the United States.

STATEMENT

This is a case where judgment creditor obtained a final judgment in which was affirmed in *Smith v Bithlo*, 344 So.2d 1288 (Fla. 4th DCA) confirming the judgment of prior case, and determining that Town of Bithlo had a duty to levy and collect taxes to pay Petitioner's judgment, but abating that action until officials could be obtained. The legislature passed Chapter 77-502 Law of Florida, effective June 30, 1977 abolishing the Town of Bithlo and requiring all property debts and obligations to be satisfied accordance with general law on April 24, 1978. Orange County was substituted for Town of Bithlo in both suits. The District Court of Appeal, Fifth District issued its decision for rehearing, *Orange County v. Smith*, 395 So.2d 1158 (Fla. 5th DCA 1981) which ignored the established laws of Florida. This decision has been applied in the Motion For Summary Judgment and the last appeal before this District Court of Appeal, Fifth District, and avers Final Judgment is not final because no defaults were entered and it had nothing in the record of persons to handle the levying and collection of taxes. There are documents in the record which show the allegations are false and that

the judgment is final and binding on the inhabitants of the former Town of Bithlo. The trial judge admitted the facts were false, but choose to follow the decision which violated the constitutional rights of Glen E. Smith.

REASONS FOR GRANTING THE WRIT

In Case 73-7910 Petitioner, Glen E. Smith obtained a Final Judgment by Default against the Town of Bithlo on 40 municipal Improvement Bonds in the Circuit Court of Orange County, Florida on October 26, 1956 for $126,790.24 plus $24.10 court costs. All elected officials moved away from the Town and there was no person to accept service of process on the Town of Bithlo. Florida Statutes 47.20 (now repealed) Glen E. Smith filed suit in 1973, Circuit Court, Orange County, Florida, Civil Action 73-7910 to enforce his judgment. The Fourth District Court of Appeal in *Smith v. Bithlo*, 314 So.2d 212 (Florida 4th District DCA 1975) reversed the lower court and held that constructive service and substituted service were valid and also that individual defendants' land excluded from corporate limits was no bar to assessment of taxes for payment of bond-holders who were not parties to judgments of ouster, and ordered a new trial. The case was remanded for a new trial, after retrial, a final judgment was entered in favor of the individual defendant and the action was abated as to the Town of Bithlo. The trial court found that the Town of Bithlo owed the entire amount of Plaintiff's judgment and had a legal duty to Plaintiff to levy and collect the necessary taxes to pay the judgment. The Final Judgment adjudged as follows:

1. The Defendant, B.C. Dodd and H.F. Dietrich and Florence Dietrich, his wife, constituting a class of owners of properties in the Town of Bithlo, shall go hence without day and this action is dismissed with prejudice.

2. As to the Defendant, Town of Bithlo, which is in *default* since no answer and defenses have been filed on its behalf, it cannot raise the defense of laches nor can the individual raise it on its behalf.

3. However, since the court has ruled that the evidence does not show that the Plaintiff is entitled to the remedy it seeks for the reason stated in paragraph 15 of this Final Judgment, this action is abated as to The Town of Bithlo, Florida.

Paragraph 15 stated that Plaintiff has failed to make a sufficient showing by the greater weight of the evidence of the availability of legally qualified individual to serve as councilmen, mayor, clerk and as other public officials for the Town of Bithlo in order for this court to mandate and direct an election be held for the Town of Bithlo. Subsequent appeal, the court said in *Smith v. Bithlo*, 344 So.2d 1288, Fla. 4th DCA 1977 Reversed for further proceedings consistent with its opinion upon the trial court may determine the qualification of these persons and made necessary appointments. The Appellate Court also held that the lapse of time between the original judgment and filing of the present suit is sufficient for laches but the Defendants have failed to prove by clear and positive evidence that the delay resulted in injury, embarassment or disadvantage to them. The evidence is insufficient to support the trial courts conclusion that the doctrine of *laches* applies.

While the appeal set forth above was pending, individuals named Earl Taylor, commenced to serve as Mayor and Ted McElwee, David Shaw, Ralph Kemp, Hobart Strickland and Richard Trimble, as Aldermen of the Town of Bithlo, and thereafter Glen E. Smith filed the present case, a Petition For Writ of Mandamus in the Circuit Court of the 9th Circuit, Civil Action 76-8763, which was abated pending the outcome of Civil Action No. 73-7910 in the Appellate Court.

The Town of Bithlo was abolished by the Florida Legislature effective July 1, 1977 by Chapter 77-502, Law of Florida 1977. Glen E. Smith then moved to substitute Orange County for the Town of Bithlo and to pursue Mandamus against Orange County pursuant to 165.052 (3) (1975). The Order of Abatement was dissolved and the Motion To Substitute was granted on April 24, 1978 as to both cases.

On April 25, 1979 Circuit Judge George N. Diamantis, after the appellate proceedings reported in *Smith v. Bithlo*, 314, So.2d 212, (Fla. App. 4th 1975) and in *Smith v. Bithlo*, 344 So.2d 1228 (Fla. App. 4th DCA 1977) entered a Final Summary Judgment and Order on Other Pending Matters. The 1973 action was a declaratory judgment affirmative relief including mandamus (Appendix C). The Court said:

> "Holder of unpaid municipal bonds and holder of judgments based upon unpaid municipal bonds have the right to compel the municipal to pay the bonded indebtedness. See *State ex rel. Gulf Life Insurance Co. v. City of Live Oak*, 170 So 608, 609; *Brown-Crummer Inv. Co. v. Town of North Miami*, 11 F Supp 73, 77 S D

Fla 1935. In other words, property located in a municipality regardless of when its present owner acquired it, is subject to taxation to pay the municipality's legal debt. Hardship on property is not a legal defense to an action to enforce payment of legal municipal obligations; though hardship may be a factor the court could consider in fashioning remedy (*North Miami, v. Meridith*, 121 F.2d 279 281-282 5 Cir 1941)"

The Defendants nor the intervenors are in a position to raise such defense of *laches*. Orange County and the county officials legally occupy the position that the abolished Town of Bithlo and its officials occupied. The Town of Bithlo never raised the defense of laches in the 1973 litigation. Since the Town of Bithlo never availed itself of any legal defenses, including the defense of laches, its people are now concluded. See *Young v. Miami Beach Improvement Co. et al.* 46 So.2d 26, 30 (Fla. 1950, Supreme Court). *City of New Port Richey, v. State ex rel O'Malley*, 145 So.2d 903, 905-906 (Fla. 2nd DCA 1962).

Orange County took an appeal to the District Court of Appeal 4th District, and the matter was transferred to the Fifth District, after its creation. The matter was argued before the court and the court on June 27, 1980, District Court of Appeal, issued its decision and judgment "PER CURIAM. AFFIRMED" (Appendix D).

(This judgment is not reported)

The District Court of Appeal, 5th District went beyond the record on Motion For Rehearing, held there

was no defaults in prior case (73-7910) and the Defendant County was not foreclosed from raising the defenses of laches.

Glen E. Smith upon receipt of such decision moved the court for a rehearing and furnished to the District Court of Appeal, 5th District two certified copies of Entry of Default against the Town of Bithlo in case no. 73-7910 dated January 14, 1974 and June 4, 1974, (The defaults were part of the record in the first appeal, *Smith v. Bithlo*, 314 So.2d 212 4th DCA 1975). The District Court of Appeal denied Glen E. Smith's Motion For Rehearing. The Appellate Court held "since Bithlo was never actually defaulted and both actions were "abated" as to it, res judicata should not apply in any event. Attached to Motion For Summary Judgment of Plaintiff, Glen E. Smith, are copies of said Defaults in record that went before the Court (R 803-811).

At the Motion For Rehearing the court adopted another false fact there is no evidence in the record before us that anyone was appointed to represent the Town of Bithlo. The record (R 697 and 699) contains a certified copy of Chapter 77-502 Law of Florida, Act of 1977 on June 30, 1977, Orange County was appointed to represent the abolished Town of Bithlo. The provisions of Section 165.052 Fla. Stat. (1977) were triggered and the Plaintiff had the necessary and qualified persons to perform the necessary functions.

Non-user of municipal power does not result in dissolution. The legislature has the sole authority to both establish and dissolve municipalities. *Treadwell v. Town of Oak Hill.* Fla. Supreme Court 1965, 175 So.2d 777.

Guardian ad Litem is a person appointed in the course of litigation for an infant or a person mentally incompetent Rule 1.210 (b) Rules of Civil Procedure (Florida). There is no case or statute authorizing a guardian ad litem for a corporation or inactive municipal corporation. The Appellate Court had no authority to create or change the law merely because the appellate court considered it to be in the best interest of "social justice" without regard to established law. *Flagler v. Flagler* 94 So.2d 594 (1957).

The Final Judgment in case no. 73-7910 was abated until officials could be appointed to levy and collect taxes to pay the creditor judgment on the bonds. Chapter 77-502 Law of Florida of 1977, abolished the Town of Bithlo and Section 165.052 Fla. Statutes (1977) met the requirements and Glen E. Smith had the necessary and qualified persons to perform all functions. The case of *Donaldson Engineering Inc. v. City of Plantation*, 326 So.2d 209 (Fla. 4th DCA 1976) confirmed that a judgment abated to a condition subsequent becomes a final judgment on the happening of the condition subsequent. The city was sued for refund of contribution, and a portion was refunded and the city was allowed to retain portion of contribution towards construction of bridge upon the condition that if the city failed to commence construction of the bridge within 2 years, funds would be refunded. Two years expired and construction had not commenced.

The District Court held that the judgment was a Final Judgment and its legal and factual findings which were conclusively binding upon parties and not subject to relitigation under doctrine of res judicata, and developer was absolutely entitled to refund.

On mandate, Orange County did not amend its answer, or file an additional affirmative defense of laches.

Ann Ross, the intervenor, other than the use of her name, did not participate in trial court proceedings or appellate proceedings above described or hereafter to be set forth.

After *Orange County v. Smith* 395 So.2d 1158, Orange County filed its' Motion For Summary Judgment and used 18 affidavits of land owners (approximately 1,500 land owners in area) that the delay in asserting their rights under the judgments prejudiced innocent parties who purchased land without knowledge of said judgment. The affidavits were to effect (1) they own property in the former incorporated area of Bithlo; (2) at purchase they were not advised of the 1924 bond issue or 1956 judgment; (3) their Warranty Deed did not reflect the judgment; (4) They would not have purchased the property if they had known of the judgment and (5) additional taxes would cause financial hardship on affiant.

Glen E. Smith furnished the trial court two certified copies and furnished the index in the appeal of case no. 73-7910 showing the defaults were entered on January 14, 1974 and June 4, 1974. (R 803-811). The Final Judgment (73-7910) is attached to affidavit of Glen E. Smith (R 705-710). Claude R. Edwards, Circuit Judge stated that he would not correct the error of the District Court of Appeal, 5th District. The lower court granted a Final Summary Judgment to Orange County, Florida.

Appeal was taken to District Court of Appeal, 5th District on two points: (1) The Final Judgment which relieved Orange County to appraise, levy taxes and collect taxes from the property that constituted the abolished Town of Bithlo pursuant to F.S. 165.052 on Plaintiff's judgment on unpaid improvement bonds was an impairment of contract, and a taking of property in violation of State and Federal Constitutional provisions (U.S. Constitution; Article 1, Sec. 10, Amendment V and Amendment XIV; Florida Constitution Article 1 Sec. 10, Article 8 Sec. 2). (2) The decision of the District Court of Appeal, 5th District in *Orange County v. Smith*, 395 So.2d 1158 was judicial impairment of contract and taking of property without due process of law in violation of U.S. Constitution Provision, Article 1, Sec. 10, Amendments V and XIV and Florida Constitution, 1968 Revision, Article 1, Sec 10, Article 8, Sec. 2.

At oral argument before the District Court of Appeal, the Chief Judge Orfinger, stated the court could not correct its error, that only the Supreme Court could correct a mistake, or settle a conflict with the other district courts of appeal.

Thereafter the court issued its judgment or decision "Per Curiam Affirmed".

Florida Constitution, 1968 Revision as modified on March 11, 1980 provides:

(1) Article 5, Section 3 (3) provides that the Supreme Court may review any decision of the District Court of Appeal *** or that *expressly* and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

(2) Article 5, Section 3 (7) * * * all writs necessary to complete exercise of its jurisdiction.

(3) Article 1, Section 21, Access To Court. The courts shall be open to every person for redress of any injury and justice shall be administrated without sale, denial or delay.

(4) Article 8, Sec 2 provides:

> . . ."When any municipality is abolished, provision shall be made for the protection of its creditors."

Glen E. Smith timely filed with the Clerk of Supreme Court a Notice to Invoke inherent or jurisdiction to prevent the taking of property without "due process" in violation of the 5th and 14th Amendment of U.S. Constitution and the Florida Constitution and Declaration of Rights and Discretionary Jurisdiction.

On October 29, 1982 the Supreme Court in case no. 62,806, issued its judgment which stated:

> "It appearing to the Court that it is without jurisdiction, the Petition to Invoke Inherent or Implied Jurisdiction to Prevent the Taking of Property Without "Due Process" in Violation of the 5th and 14th Amendment of U.S. Constitution and the Florida Constitution and Declaration of Rights and Discretionary Jurisdiction is hereby dismissed." (Appendix A).

In *Mutual Ben. Health & Accident Ass'n v. Bunting*, 133 So 321 Florida 1938, the court held:

> Under its constitutional power to issue writs of mandamus, certiorari, prohibitions, quo warranto and other writs necessary or proper to the complete exercise of its jurisdiction, the Supreme Court may exercise supervisory jurisdiction over other courts in conformity with command of Declaration of Rights that all courts shall be open so that every person for any injury done him shall have remedy by due course of law.

A state can no more impair the obligation of an antecedent contract by adopting a constitution or amending its constitution, than by enacting or amending statutes 10 Florida Jur 2d, Constitutional Law Sec. 306.

The result of the words "Per Curiam Affirmed" are just as destructive as an express, long written statement. The Supreme Court has supervisory jurisdiction over the court of Florida. When a fundamental error is committed by a District Court it should not be permitted to ignore a mandate in the Constitution that where a town is abolished, that the creditor must be protected. Is the Court impartial where it goes beyond and outside of the record and adopts false facts, when the record before the Court shows that the false facts are incorrect? The Motion For Rehearing contains the error and notwithstanding the effort to correct, the courts persisted in perpetuating this error which impairs Glen E. Smith's right as judgment creditor on town improvement bonds. A State judicial decision can no

more impair contract than can legislative act. The trial judge, the District Court of Appeal admitted that the decision was erroneous, and nothwithstanding, it would be followed even though it impaired Petitioner's rights as a judgment on municipal bonds in violation of the United States Constitution, and State of Florida Constitution.

In *United States v. City of Cocoa*, District Court, S D Florida 1936, 17 F. Supp 59; *Morton v. Zuckerman-Vernon Corp.* Fla. DCA 3rd 1974, 290 2d 141, the Court held:

> Spirit of constitutional prohibition against impairment of obligation of contracts should govern courts as well as legislative bodies, and the court should never approve any attempt to impair the obligation of contracts, notwithstanding prohibition is only effective against legislative bodies. (Const.art.1, Sec. 10).

Also see, *Brown Crummer Inv. Co. v. Town of North Miami*, District Court, S D Florida, 1935, 11 F. Supp 73.

A judgment against municipal corporation in matters of general interest to all its citizens is binding on them, though they were not parties to the suit. If the municipality fails to avail itself of legal defenses, the people are concluded by the judgment. See *Young v. Miami Beach Improvement Co*, Fla. 46 So.2d 26 (Supreme Court); *City of New Port Richey v. State*, Fla. 2 DCA 1962, 145 So.2d 903.

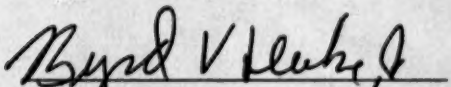
The Final Summary Judgment trial court and the decision of the District Court of Appeal, 5th District, does not protect the judgment creditor of the Town of Bithlo, but destroyed or impaired Plaintiff's judgment on municipal obligation and is the deprivation of property by procedural error which violates "Due Process".

U.S. Constitution, Article 1, Sec 10, Amendments V and XIV.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies hereof has been furnished each to James F. Page, Jr., Esquire of Gray, Harris & Robinson, attorneys for Respondent, at P.O. 3068, Orlando, Florida, 32802; and Herbert R. Swofford, Esquire, attorney for Ann Ross, at 1212 East Colonial Drive, Orlando, Florida, this 25 day of January, 1983.

Byrd V Duke, Jr.

BYRD V. DUKE, JR.